

SERVED: February 10, 1999

NTSB Order No. EA-4745

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 8th day of February, 1999

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JANE F. GARVEY, )	
Administrator, )	
Federal Aviation Administration, )	
)	
Complainant, )	
)	
v. )	Dockets SE-15169
)	SE-15172
MARK J. GUSEK, and )	
ERIE AIRWAYS, INC., )	
)	
Respondents. )	
)	
_____ )	

**OPINION AND ORDER**

Respondents have appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on April 23, 1998, following an evidentiary hearing. <sup>1</sup> The law judge affirmed orders of the Administrator revoking all airman certificates held by respondent Gusek and any air carrier certificates held by respondent Erie Airways, Inc., on finding

<sup>1</sup> The initial decision, an excerpt from the transcript, is attached. Respondents waived application of the emergency appeal procedures and deadlines.

that they had violated various sections of 14 C.F.R. Part 135 and that Mr. Gusek had also violated 14 CFR 61.59(a)(2).<sup>2</sup> We deny the appeal.

There are four basic parts to the Administrator's case: first (in no particular order), Erie Airways, Inc. (Erie) is charged with failing to maintain its manual; second, Erie is charged with failing to conduct necessary drug tests on pilots; third, Erie and Mr. Gusek are charged with failing to comply with numerous pilot qualification/training requirements for Part 135 operations; and, fourth, Mr. Gusek is charged with making fraudulent or intentionally false statements on load manifests. According to the record, Erie was, at the time relevant to this

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<sup>2</sup> The Administrator charged respondent Gusek with violations of: § 135.243(a)(1), which prohibits serving as pilot in command in turbojet, passenger-carrying operations without an airline transport pilot certificate having appropriate category and class ratings and, if required, an appropriate type rating; § 135.293(b), which prohibits acting as a pilot in a Part 135 operation without a competency check; § 135.299(a), which prohibits acting as a pilot in command of a flight without passing a flight check; and § 61.59(a)(2), which prohibits fraudulent or intentionally false entries required to be kept, made, or used to show compliance with regulatory requirements. The Administrator charged respondent Erie with violations of: § 135.21(a), which requires certificate holders to keep and use a current manual of procedures and policies acceptable to the Administrator; § 135.243(a)(1), insofar as it also prohibits certificate holders using such persons as pilots in command; § 135.251(a), which requires certificate holders to test certain employees for prohibited drugs; § 135.293(b), insofar as it prohibits a certificate holder from using such pilots; § 135.299(a), insofar as it prohibits certificate holders from using pilots in command without flight checks; § 135.341(a), which requires certificate holders to maintain an approved pilot training program; and § 135.63(c), which requires certificate holders to maintain, for multiengine aircraft, accurate load manifests containing certain required information.

case, primarily a charter operator. Mr. Gusek's testimony indicates that, as President of Erie at the time, he had as a goal the expansion of Erie's fleet through, in part, purchases of shares in aircraft by interested companies. Many of the Administrator's charges hinge on whether respondents were providing for-hire charter services subject to Part 135 requirements, or were providing Part 91 demonstration flights for potential buyers (for which payment is authorized in specified amounts and under specified conditions, see 14 CFR 91.501). Heightened safety requirements apply to Part 135 operations.

Respondents claimed that, either the flights were legitimate Part 91 flights, or they reasonably believed them to be. The law judge did not find either to be the case, affirming as he did all the charges, including the intentional falsification charge against Mr. Gusek.

Respondents' appeal first challenges the law judge's reliance on the testimony of two of the Administrator's witnesses, both of whom were prior employees of Erie. Respondents claim that this testimony is wholly unreliable. <sup>3</sup>

We will not reverse on this basis. We have consistently held that, having had the opportunity to observe the witnesses, the law judge is in the best position to determine their credibility. The law judge was well aware, given Mr. Gusek's

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<sup>3</sup> Key aspects of this testimony involved the degree to which these two individuals, both prior Directors of Operations for Erie, had challenged Mr. Gusek concerning his categorization of flights as Part 91, rather than Part 135, flights.

testimony and that of Mr. Conner, Erie's owner, that there were two different versions of events: one from the Administrator's witnesses Sullivan and Howard, and one from Messrs. Gusek and Conner. Deciding which version was more reliable was a necessary part of his decision, and he recognized the personal interest of some witnesses (Tr. at 497-498). We will not lightly overturn his conclusions, and we are presented no reasons to do so here other than an alleged bias, an issue that was raised in the record, and one that the law judge incorporated in his credibility analysis. Administrator v. Smith , 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge). See also Administrator v. Jones , 3 NTSB 3649, 3651 (1981).

Next, respondents argue that the Administrator did not prove fraud, nor did she prove intentional falsification because no actual knowledge was proven. The law judge found intentional falsification by Mr. Gusek. Tr. at 501, paragraph 12. Respondents correctly argue that, to find intentional falsification, the law judge was required to find that Mr. Gusek knew he made a false statement. <sup>4</sup> The law judge's finding of this allegation, however, assumes such a prerequisite, and the record

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<sup>4</sup> Proof of intentional falsification requires: 1) a false representation; 2) in reference to a material fact; and 3) made with knowledge of its falsity. Hart v. McLucas , 535 F.2d 516, 519 (9th Cir. 1976).

supports that finding.

Findings of actual knowledge, as are required in a case such as this, are often based on circumstantial evidence. If circumstantial evidence is used to prove actual knowledge of fraud or intentional falsification, that circumstantial evidence must be so compelling that no other determination is reasonably possible. Administrator v. Hart, 3 NTSB 24, 26 (1977). In view of Mr. Gusek's position and background, and the testimony from Messrs. Sullivan and Howard (testimony the law judge accepted as credible) that they had discussed with Mr. Gusek on various occasions the propriety of categorizing flights as Part 91 or Part 135,<sup>5</sup> we have no difficulty affirming the law judge's finding on this point and rejecting respondents' contention that what repeatedly occurred was "an oversight" by Mr. Gusek. The facts in Administrator v. Tsosie, NTSB Order No. EA-4679 (1998), are considerably different.

Respondents also argue (as we understand this claim, see Brief at 14) that the failure properly to complete the load manifests is insufficient to prove a violation of § 61.59(a)(2) because it does not "show compliance with any requirement for the issuance, or exercise of the privileges of any certificate or

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<sup>5</sup> E.g., Tr. at 53-55, 86-87, 91. See also Tr. at 135-136. There was also extensive evidence, not directly on this point, but clearly relevant, from users of Erie's services that they assumed they were receiving charter, for hire service. That passengers assumed a certain level of service (and safety), but were actually getting another, lower level of pilot accomplishment is a serious matter.

rating." We disagree. Complete, accurate load manifests were required for Erie's lawful operation of its charter services under Part 135. Mr. Gusek did not produce complete, accurate manifests, notably in his failure to report passengers on flights.

Finally, respondents argue that the allegations were stale, and should have been dismissed pursuant to 49 CFR 821.33. It is well settled that orders of revocation, based on legitimate claims of lack of qualification, are an exception to our stale complaint rule. Application of US Jet, NTSB Order EA-3817 (1993). It is also established that one intentional falsification finding will justify a lack of qualification finding and certificate revocation. Administrator v. Rea, NTSB Order EA-3467 (1991), citing Administrator v. Cassis, 4 NTSB 555 (1982), reconsideration denied, 4 NTSB 562 (1983), aff'd, Cassis v. Helms, Admr., FAA, et al., 737 F.2d 545 (6th Cir. 1984). Therefore, Mr. Gusek's certificate was properly revoked.

Respondents argue that the falsification charge cannot apply to Erie, apparently in a claim that this charge cannot support revocation of Erie's certificate. (Respondents offer no other reason for us to reconsider the revocation sanction against Erie.) Although we note that no falsification charge was brought against Erie, we agree with the Administrator that, in the circumstances, revocation is justified for Erie as well. As the Administrator argues in her reply, the record shows that Mr. Gusek was Erie, for all practical purposes and certainly as

regards the issues in this case. He ran all aspects of the operation. Accordingly, we have no difficulty imputing his actions to Erie for sanction purposes, or in concluding, on the record as a whole, that lack of qualification has been established and revocation appropriate for Erie. "[A]n air carrier whose management does not adhere unflinchingly to all relevant operational standards does not meet its obligation to provide the highest degree of safety." Administrator v. Echo & Rafter, NTSB Order No. EA-4150 (1994) at 13.

**ACCORDINGLY, IT IS ORDERED THAT:**

Respondents' appeal is denied.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.